

STATE OF MICHIGAN
COURT OF APPEALS

CELESTINE TODD,

Plaintiff-Appellant,

v

LA FONTAINE MOTORS, INC., doing business
as LA FONTAINE TOYOTA,

Defendant-Appellee.

UNPUBLISHED
February 24, 2004

No. 243687
Wayne Circuit Court
LC No. 01-120630-NI

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition, apparently pursuant to MCR 2.116(C)(10) since the judge referred to evidence outside the pleadings. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff's complaint indicates that a 1990 Toyota owned by defendant hit her when it was going the wrong way on the Lodge Freeway. The police report indicates that another vehicle hit plaintiff's vehicle after swerving to avoid the car going the wrong way. For purposes of the issue on appeal, there appears to be no dispute that the vehicle going the wrong way was defendant's Toyota.

Following the accident, Burchard Adrian Elzy, who worked for defendant, reported that this Toyota had been stolen prior to the accident. He said that he was leaving a bar with a woman named Simone (he could provide no other information about her) when two men approached and asked for his money. Elzy claimed that they beat him up and that he lost consciousness when they struck him in the head. He claimed that when he awoke, the car, the woman and the suspects were gone, and that he walked home and went to bed. The police officer who took this report noted that Elzy said he did not immediately call the police because he was shaken up, that he did not seek medical attention "after being savagely beaten unconscious," that he did not show any physical signs of an attack, and that the robbers were able to locate the vehicle in a lot full of cars. Further, Elzy's girlfriend subsequently advised the police that he had filed a false police report. She said he was actually involved in an accident on the Lodge, that the vehicle had caught on fire, that he walked away and was picked up by a

passerby who drove Elzy to her home, and that he was covered with soot from the fire. She claimed that the passerby called to extort money from Elzy to keep quiet about the accident and that Elzy then admitted that he had been in an accident. Neither the police nor counsel were able to locate Elzy thereafter.

The vehicle, when recovered, was “a total burn with body damage.” The keys were still in the ignition. Defendant filed an affidavit of vehicle theft and its insurance company covered the loss.

II. STANDARD OF REVIEW

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

III. ANALYSIS

The owner's liability statute provides that the owner of a vehicle shall not be liable “unless the motor vehicle is being driven with his or her express or implied consent or knowledge.” MCL 256.401. In *Bieszck v Avis Rent-a-Car System, Inc*, 459 Mich 9, 18-19; 583 NW2d 691 (1998), the Supreme Court noted that “the operation of a motor vehicle by a person who is not a member of the owner's family gives rise to a rebuttable common-law presumption of consent,” but “the existence of a presumption does not shift the ultimate burden of proof.” Also, the presumption is not conclusive despite a high threshold requiring that it be overcome with “positive, unequivocal, strong and credible evidence.”

Defendant argues that the police report and the paid insurance claim establish that a thief was operating the vehicle without consent, and that there was no credible evidence to the contrary. Defendant claims that *Lahey v Sharp*, 23 Mich App 556; 179 NW2d 195 (1970), provides that the *filing* of the police report, not its contents, is itself strong, credible evidence that no consent was given. In *Lahey*, the defendant claimed that someone had stolen its car. The Court found that the question of consent was properly left to the jury where there was no evidence that the car had been reported as stolen and the keys were in the vehicle at the time of the accident. Defendant asserts that if a car has been reported as stolen, the report will suffice to establish a lack of consent. However, while the absence of a report might call into question whether something was really stolen, the existence of a report does not necessarily establish that it is so. That is especially true where, as here, the report was suspect and one could rationally conclude that Elzy was actually trying to cover up his involvement in one or both accidents. Under these circumstances, the filing of the report does not credibly establish that the car was being driven without defendant's consent.

Moreover, despite defendant's protestations that it was relying on the *filing* of the report, not its contents, it is the hearsay contents – Elzy's statement that the car was stolen -- that defendant is relying on in trying to rebut the presumption of consent. This statement would be a second level of hearsay. *Maiden v Rozwood*, 461 Mich 109, 124; 597 NW2d 817 (1999). Moreover, since Elzy apparently had a motive to misrepresent, the report could not be presumed trustworthy. *Solomon v Shuell*, 435 Mich 104, 120; 457 NW2d 669 (1990). Accordingly, neither the statement nor the report would be admissible evidence and therefore should not have been considered in evaluating the summary disposition motion. See *Maiden, supra*, 461 Mich

121. Since there was a statutory presumption that defendant gave consent to the driver of the vehicle, and defendant could not overcome this presumption with admissible evidence, let alone “positive, unequivocal, strong and credible evidence,” the trial court erred in granting summary disposition to defendant.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Patrick M. Meter

/s/ Donald S. Owens